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No. 10-544

IN THE
Supreme Court of the United States

FRANK GANGI,
Petitioner,

v.

VERIZON NEW ENGLAND INC.
D/B/A VERIZON MASSACHUSETTS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT VERIZON NEW ENGLAND INC.

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QUESTIONS PRESENTED

In 2006, the First Circuit held that a 2001 Federal Communications Commission ("FCC") order did not prevent the Massachusetts Department of Telecommunications and Energy from compelling one of petitioner's companies to pay respondent's tariffed rates for certain calls delivered over respondent's network. In a separate lawsuit, respondent obtained a $57 million judgment against petitioner personally and against his company for failure to pay the amounts due. In 2010, the First Circuit affirmed that judgment. The questions presented are:

1. Whether the relevant state and federal regulatory agencies, the reviewing federal district court, and the First Circuit correctly concluded that a pricing mechanism the FCC established in 2001 and retained in 2008 that set rates for certain specific types of dial-up Internet Service Provider traffic does not apply to the different calling arrangement at issue in this case.

2. Whether *res judicata* bars petitioner from relitigating the claims and issues resolved by the First Circuit in 2006 because its decision affirmed a final judgment entered by the district court in 2005 that is no longer subject to appeal.

3. Whether the First Circuit correctly held that, by attempting to "sandbag" (Pet. App. 25a) respondent with a late-asserted defense of alleged failure to exhaust administrative remedies, petitioner's company could and did waive any such defense that might exist.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Verizon New England Inc. d/b/a Verizon Massachusetts states the following:

Verizon New England Inc., f/k/a New England Telephone and Telegraph Company d/b/a Bell-Atlantic Massachusetts, is wholly owned by NYNEX Corporation, which in turn is a wholly owned subsidiary of Verizon Communications Inc., a publicly owned company. Verizon Communications Inc. has no parent company, and no publicly held company has a 10% or greater ownership interest in Verizon Communications Inc.

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This case presents no question worthy of certiorari. Petitioner Frank Gangi ("Gangi") has failed to show that any relevant circuit split exists or that this case involves any question of nationwide import. His claims of conflict and confusion among the lower courts do not withstand scrutiny. And he omits and misstates important procedural points that render this case an unsuitable vehicle for resolving any question that affects anyone but the parties.

What this case really involves is a last-ditch attempt by Gangi to escape the consequences of his own actions. For years, Gangi's company Global NAPs, Inc. ("GNAPs") engaged in an abusive regulatory arbitrage scheme by gaming the regulations governing intercarrier charges applicable to local "dial-up" telephone calls to Internet Service Providers ("ISPs"). The Federal Communications Commission ("FCC" or "Commission") ultimately adopted rules to shut down this arbitrage scheme that, logically, addressed the calls that were the focus of the scheme.

As relevant here, GNAPs employed a different calling arrangement that allowed long-distance calls to be made to its ISP customers free of the toll charges that would normally apply. GNAPs argued that, under the pricing rules adopted by the FCC to *stop* arbitrage payments to GNAPs (and similar companies), Verizon had to make *additional* payments to GNAPs for such calls. But regulators and courts ruled (after years of litigation and multiple intervening appeals) that the FCC's pricing rules did not apply to those long-distance calls and that GNAPs had to pay Verizon rather than vice versa.

GNAPs refused to pay, leading to more years of litigation — in which it continued to advance new theories relentlessly and to lose at every turn. Ulti-

mately, Verizon obtained a judgment against GNAPs for $57 million, and the courts held Gangi personally liable for that amount after piercing GNAPs' corporate veil as a sanction for Gangi's destruction of evidence and "lie[s] to the court," Pet. App. 44a.

GNAPs, which (along with other Gangi-owned companies) is now controlled by a Receiver, does not seek certiorari. Gangi does, but his petition lacks any basis to support a grant. As the D.C. Circuit observed as long ago as 2001 in addressing another part of this same controversy, "GNAPs" — and now Gangi — "sought to game the . . . rules, and lost." *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 260 (D.C. Cir. 2001). Nothing about that well-deserved loss warrants review.

STATEMENT

As the district court observed in its final grant of summary judgment to Verizon, "[t]he history of this case is a protracted and complicated one." Pet. App. 54a. As the court of appeals observed years earlier, that complexity stems from a series of "efforts by GNAPs," and now Gangi, "to delay or avoid payment of . . . sums past due to Verizon" through repetitious litigation. *GNAPs IV*, 489 F.3d at 18.[1]

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[1] This brief uses the same short-form citations for prior appeals that the First Circuit did in its most recent decision. *See* Pet. App. 3a-4a (identifying the cases as: *Global NAPs, Inc. v. Verizon New England Inc.*, 396 F.3d 16 (1st Cir. 2005) ("*GNAPs I*"); *Global NAPs, Inc. v. Massachusetts Dep't of Telecomms. & Energy*, 427 F.3d 34 (1st Cir. 2005) ("*GNAPs II*"); *Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59 (1st Cir. 2006) ("*GNAPs III*"), *reprinted in* Pet. App. 75a-111a; *Global NAPs, Inc. v. Verizon New England Inc.*, 489 F.3d 13 (1st Cir. 2007) ("*GNAPs IV*")). It refers to that most recent decision, *Global NAPs, Inc. v. Verizon New England Inc.*, 603

1. From at least 2000 to 2006, GNAPs provided ISPs with an arrangement known as "Virtual NXX" (or "VNXX"). "NPA-NXX" represents the first six digits of a ten-digit telephone number under the North American Numbering Plan. For example, in this Court's general number (202) 479-3000, the NPA-NXX is "(202)-479." Historically, each NPA-NXX has corresponded to a particular telephone exchange in a particular local calling area. A "Virtual NXX" number is one assigned to a customer that is physically located outside of the exchange associated with the NPA-NXX in its assigned telephone number. The call to a Virtual NXX number appears local to the person dialing the number, though the recipient of the call is far away. The call also appears local to the telephone company (here, Verizon) that serves the caller.

GNAPs assigned Virtual NXX numbers associated with exchanges throughout Massachusetts to its ISP customers, which sold "dial-up" Internet access. "Dial-up" is a form of Internet access in which a customer's modem, using the same kind of telephone line used for voice calls, makes a standard telephone call to a modem belonging to the ISP. This case thus does not involve any broadband service, such as that provided over Verizon's FiOS and DSL offerings or a cable company's cable modem service; any wireless service; or any service using Voice over Internet Protocol ("VoIP").

The Virtual NXX numbers that GNAPs assigned allowed its ISP customers to offer to their own Massachusetts customers, who purchase local telephone service from Verizon among others, the ability

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F.3d 71 (1st Cir. 2010), *reprinted in* Pet. App. 1a-50a, as "*GNAPs V.*"

to access the Internet by dialing an apparently local telephone number. Callers dialing these Virtual NXX numbers would pay only for a local call, even though their calls were actually travelling to places that would ordinarily trigger a toll charge.[2]

GNAPs argued that Verizon had to pay it charges for completing these Virtual NXX calls to ISPs, claiming that the calls were just like ordinary local calls. *See* 47 U.S.C. § 251(b)(5). Verizon argued that the calls were in fact toll-free, long-distance calls, no different from toll-free, long-distance calls made using a traditional "800" service, and that GNAPs should pay Verizon the charges that would be due under its tariffs for such calls.

2. In 2002, Verizon and GNAPs presented that dispute to the Massachusetts Department of Telecommunications and Energy ("Department").[3] Exercising its authority under 47 U.S.C. § 252 to resolve disputes regarding the terms of the contracts between local telephone companies, known as interconnection agreements, the Department ruled for Verizon. The Department agreed with Verizon that Virtual NXX is essentially a "substitute toll-free calling service" and held that Virtual NXX calls should "be rated as local or toll based on the geographic end points of the call." Pet. App. 159a, 162a. Accordingly, GNAPs would

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[2] Increasingly, the distinction between "local" and "toll" (and between inter- and intrastate toll) is disappearing, as customers purchase flat-rated, any-distance wireline and wireless plans. At the time of the dispute between Verizon and GNAPs, these distinctions mattered more to both consumers and carriers, as they governed the amount that consumers would pay to their carriers and that carriers would pay to each other.

[3] The Department is now known as the Department of Telecommunications and Cable.

have to pay Verizon's tariffed charges on Virtual NXX traffic. The Department ordered the parties to develop contract language to reflect its decision. *See id.* at 168a. The Department later approved a contract between GNAPs and Verizon containing such language. *See id.* at 90a.

In reaching its decision, the Department rejected GNAPs' argument that its ruling was inconsistent with the FCC's *ISP Remand Order*.[4] *See id.* at 152a-153a. In that order, the FCC adopted a pricing methodology for certain dial-up ISP traffic to address the significant "regulatory arbitrage" problem that had arisen because dial-up traffic is one way — "ISP modems do not generally call" back — so payments by carriers originating these calls led to "large one-way flows of cash" to companies, like GNAPs, with ISP customers. *ISP Remand Order* ¶¶ 8, 21, 70. Indeed, before the FCC's ruling, GNAPs was among the companies that, together, had generated a total of nearly $2 billion annually in abusive "windfall" profits by signing up ISP customers exclusively or almost exclusively. *Id.* ¶ 70. When GNAPs sought to shield itself behind the FCC order meant to curtail its own uneconomic arbitrage, however, the Department rejected GNAPs' contention that the FCC's pricing rules "control[] . . . [the] issues in th[e] arbitration." Pet. App. 147a.

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[4] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

GNAPs filed a complaint (the "2002 Complaint")[5] in the District of Massachusetts challenging the Department's ruling with respect to Virtual NXX traffic.[6] GNAPs claimed that the Department's ruling on Virtual NXX ISP traffic was inconsistent with the *ISP Remand Order*.

3. Throughout 2003 and 2004, Verizon continued to deliver calls to GNAPs and to bill GNAPs charges for those calls pursuant to the terms of the contract the Department had approved. GNAPs did not pay the bills. On March 17, 2005, Verizon warned GNAPs that it already owed Verizon $42 million and that, if GNAPs did not pay, Verizon would terminate service. In response, GNAPs obtained an order from the district court requiring Verizon to continue providing service, claiming that it could not pay the amounts due under the interconnection agreement and that its business would be destroyed if service were terminated. *See* Pet. App. 35a-36a.

The district court then turned to the merits of the 2002 Complaint. On September 21, 2005, it granted partial summary judgment to the Department and

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[5] *See* Complaint, *Global Naps, Inc. v. Verizon New England Inc., et al.*, No. 02-12489 (D. Mass. filed Dec. 30, 2002) ("2002 Complaint").

[6] In 2003, GNAPs filed a second complaint, which challenged the Department's decision that GNAPs could not refuse to sign an interconnection agreement reflecting the Department's ruling on Virtual NXX traffic. *See* Complaint, *Global Naps, Inc. v. Verizon New England Inc., et al.*, No. 03-10437 (D. Mass. filed Mar. 6, 2003) ("2003 Complaint"). The parties litigated the 2003 Complaint first. The district court granted summary judgment for the Department and Verizon and entered a final judgment against GNAPs on May 13, 2004. On January 19, 2005, the First Circuit affirmed in *GNAPs I*. On May 31, 2005, this Court denied GNAPs' petition for certiorari.

Verizon, rejecting GNAPs' claim that the pricing regime in the *ISP Remand Order* governed the calling arrangement at issue here.[7] GNAPs then stipulated to an order dismissing all other claims in the 2002 Complaint with prejudice in order to obtain an appealable final judgment. The district court entered the stipulated judgment on October 31, 2005.

On appeal, GNAPs did "not challenge the [Department's] determination that whether a call is local or 'interexchange' should be based on the geographic endpoints of the call, or the decision to impose access charges on non-ISP-bound VNXX calls." *GNAPs III*, Pet. App. 103a. Instead, GNAPs claimed only that the FCC intended for its ISP pricing regime to control "charges for . . . non-local ISP-bound traffic," such as the Virtual NXX traffic at issue in this case. *Id.* at 103a-104a. Verizon and the Department responded that the FCC's pricing regime applied only where the ISP and the caller were located in the same local calling area. The First Circuit invited and received an *amicus* brief from the FCC concerning the correct interpretation of the *ISP Remand Order*. The FCC's brief acknowledged that, "[i]n some respects, the *ISP Remand Order* appears to address all calls placed to ISPs," but clarified that "the Commission [had been] focused on calls between dial-up users and ISPs in a single local calling area." *Id.* at 108a (internal quotation marks omitted; alteration in original).

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[7] The petition incorrectly identifies the district court's September 21, 2005 ruling as the resolution of "cross-motions for summary judgment on [Verizon's] counterclaim." Pet. 12. That counterclaim was raised in response to GNAPs' 2005 Complaint, not the 2002 Complaint. *See* Complaint, *Global NAPs, Inc. v. Verizon New England Inc.*, No. 05-10079 (D. Mass. filed Jan. 12, 2005) ("2005 Complaint"); *infra* p. 9.

The First Circuit affirmed. *See GNAPs III*, *reprinted in* Pet. App. 75a-111a. The First Circuit held that neither the text nor the context of the *ISP Remand Order* supported a conclusion that the order's pricing regime "clearly preempt[ed] state authority to impose access charges for interexchange VNXX ISP-bound traffic." *Id.* at 103a. It reasoned that, in light of the "important distinction" in telecommunications law between different types of charges, the FCC would have spoken more clearly if it had intended its new pricing mechanism to apply to the tariffed charges at issue here. *Id.* at 105a.

In addition, the court relied on the venerable "'maxim . . . that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.'" *Id.* at 106a (quoting *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006), quoting in turn *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (Marshall, J.)). Because the *ISP Remand Order* as a whole was focused on a problem of arbitrage in the reciprocal-compensation system for calls within the same calling area, the court declined to construe the FCC's pricing regime meant to remedy that arbitrage as displacing otherwise applicable tariffed charges for different call arrangements simply because some language in it might read that way in isolation.[8]

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[8] After affirming, the First Circuit "remanded to the district court for any further proceedings." Pet. App. 111a. The only further proceedings stemming from the 2002 Complaint involved a postjudgment dispute over $16 million in security that GNAPs had provided for the orders that had compelled Verizon to continue providing service. *See GNAPs IV*, 489 F.3d 13 (affirming the district court's release of the security to Verizon).

4. On January 12, 2005, while the 2002 Complaint was pending, GNAPs filed the 2005 Complaint in the district court. The 2005 Complaint alleged that the FCC's *Core Forbearance Order*,[9] which modified certain aspects of the FCC's pricing regime for ISP traffic, entitled GNAPs to bill Verizon for traffic delivered to GNAPs' ISP customers.[10] On March 14, 2005, Verizon answered the 2005 Complaint and counterclaimed for the originating charges that GNAPs owed under the parties' interconnection agreement. GNAPs' reply to Verizon's counterclaim did not raise any argument that the counterclaim had to be presented to the Department before the district court could rule upon it.[11]

During 2005 and 2006, Verizon uncovered evidence that assets and revenues belonging to GNAPs had been moved to other entities also owned by Gangi. Verizon therefore moved for prejudgment remedies to secure its counterclaim. It also sought judgment on the pleadings on the 2005 Complaint. The district court granted both of Verizon's motions. Verizon then diligently attempted to attach GNAPs' assets, but was able to locate less than $1 million in GNAPs'

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[9] Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004) ("*Core Forbearance Order*"), *petitions for review denied, In re Core Communications, Inc.*, 455 F.3d 267 (D.C. Cir. 2006).

[10] In resisting Verizon's later motion for judgment on the pleadings, GNAPs argued to the district court that the "basis of [its] claim" in the 2005 Complaint was "the [i]nterconnection [a]greement" between the parties. C.A. App. 399.

[11] The relevant portions of the record can be found at C.A. App. 65-75 (2005 Complaint), C.A. App. 90-107 (Verizon's Answer and Counterclaim), and C.A. App. 125-28 (GNAPs' Reply to Verizon's Counterclaim).

name. Verizon accordingly added Gangi (among numerous other entities) as a counterclaim defendant, seeking to hold him personally liable by piercing the veils of the corporations he owned.

GNAPs and Gangi moved twice to dismiss Verizon's amended counterclaim. The first motion raised a challenge to the district court's subject-matter jurisdiction under 28 U.S.C. § 1367 that is not presented in the petition. In the second motion, filed in June 2007, GNAPs raised for the first time the argument that Verizon's counterclaim against GNAPs itself (originally asserted in March 2005) had to be presented to the Department before the district court could rule upon it. *See* Pet. App. 11a. On January 7, 2008, the district court denied that motion. *See id.* at 70a-74a.

5. Discovery continued into the summer of 2008. During that time, Verizon learned that Gangi and his companies had destroyed or withheld business and accounting records that were necessary for Verizon to make its case against GNAPs, Gangi, and the other counterclaim defendants. As a result, on October 16, 2008, Verizon sought a default judgment on all of its claims.

While the motion for default judgment was pending, the FCC issued the *Second ISP Remand Order*.[12] In that order, the FCC responded to the D.C. Circuit's 2002 remand of its *ISP Remand Order* by speci-

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[12] Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 24 FCC Rcd 6475 (2008) ("*Second ISP Remand Order*"), *petitions for review denied*, *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) ("*Core v. FCC*"), *cert. denied*, Nos. 10-185 & 10-189 (Nov. 15, 2010).

fying the source of its legal authority to establish its ISP pricing regime; however, the FCC "maintain[ed]," and did not change, the substance of that regime. *Second ISP Remand Order* ¶¶ 1, 29. On November 14, 2008, GNAPs moved for summary judgment, claiming that the new order had "clarified" that the FCC had intended to preclude imposing charges on GNAPs for any ISP-bound calls, regardless of whether the caller and ISP were in the same local calling area. On November 18, 2008, the district court denied that motion, stating that the *Second ISP Remand Order* could "not undo everything that's happened in the case over the last eight years" and that "it's hard . . . to see how the FCC can effectively overrule the First Circuit."[13]

On December 3, 2008, after an evidentiary hearing, the district court granted default judgment against Gangi and held him personally liable to pay any judgment against GNAPs, finding that Gangi had committed willful discovery misconduct and that Gangi and another GNAPs employee had "lied to the court" on the witness stand in an attempt to conceal their actions. Pet. App. 44a; *see id.* at 44a-47a (summarizing the district court's findings). The district court also ruled on December 4 that GNAPs

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[13] The relevant portion of the district court's November 18 bench ruling is reproduced at C.A. App. 2062-63. Citing the same pages of that transcript, the petition claims (at 14) that the district court "stat[ed] that its prior determination on the issue was 'law of the case.'" The district judge did not say the words Gangi has placed in quotation marks. Gangi's misquotation of the district court is material. As discussed *infra* notes 17 and 18, the question whether the district court's and the First Circuit's prior rulings are mere law of the case or carry the full force of *res judicata* is relevant to Gangi's ability to raise certain questions purportedly presented by this petition.

was judicially estopped from contesting certain statements it had made in 2005 about the charges it would have to pay to Verizon if it lost in *GNAPs III*. *See id.* at 64a-69a (denying reconsideration of that ruling).

On January 22, 2009, the district court granted summary judgment to Verizon on its counterclaim against GNAPs. The court found GNAPs (and therefore Gangi) liable for $57,716,714. *See id.* at 53a-64a.

6. On appeal, the First Circuit affirmed. *See GNAPs V*, *reprinted in* Pet. App. 1a-50a. The court rejected GNAPs' and Gangi's argument that the *Second ISP Remand Order* provided a reason for revisiting *GNAPs III*. It concluded that "[t]he *Second [ISP] Remand Order*'s express purpose was to justify — not change — a particular rate system" that the court had previously construed. *Id.* at 18a. It found support for this conclusion not only in the order itself, but also in the D.C. Circuit's opinion upholding the order and in the FCC's brief to the D.C. Circuit in that case. *See id.* at 17a. Accordingly, the court declined to revisit its "h[o]ld[ing], in *GNAPs III*, that [the FCC's rate] system applied only to local ISP traffic." *Id.* at 18a.

The First Circuit also rejected GNAPs' and Gangi's argument that Verizon was required to submit to the Department its counterclaim for amounts due under the interconnection agreement before bringing that claim to the district court. The court first held that the district court had subject-matter jurisdiction over the counterclaim and that nothing in the Telecommunications Act of 1996 ("1996 Act") took that jurisdiction away. *See id.* at 20a-24a. It then reasoned that, because jurisdiction existed, GNAPs' claim amounted at most to "a type of administrative-

exhaustion argument," *id.* at 24a, and that exhaustion requirements that Congress has not expressly made a prerequisite to a court's subject-matter jurisdiction can be waived, *see id.* Noting that "GNAPs did not raise this [exhaustion-type] argument until nearly two years after Verizon filed its counterclaim, and only after GNAPs' other arguments had been rejected," the court concluded that GNAPs had attempted to "sandbag its opponent" and held that the claim was waived. *Id.* at 25a.

The First Circuit also affirmed the district court's other rulings against GNAPs and Gangi. In doing so, the First Circuit held that judicial estoppel against GNAPs was appropriate because "[t]here is no doubt that GNAPs deliberately played fast and loose with the courts in an effort to gain an unfair advantage," *id.* at 38a, and that the district court's entry of "default judgment . . . as a sanction for willful discovery misconduct . . . against . . . Gangi" was "well supported in the record," in part because "Gangi . . . lied to the court about the records GNAPs kept," *id.* at 43a-44a. GNAPs does not challenge those rulings before this Court.

REASONS FOR DENYING THE PETITION

Gangi fails to show the existence of any relevant split among the circuits or other question of importance. The First, Second, and Ninth Circuits are the only ones to have considered whether the FCC's *ISP Remand Order* pricing regime extends to Virtual NXX calls to ISPs. All three agree that it does not. The question also has diminishing practical importance because it is limited to the scope of a regulatory remedy for arbitrage and fraud in the context of dial-up ISP access — an outmoded technology that is rapidly giving way to newer ones. In addition, even if the question warranted review, this case would be an unsuitable vehicle for that review: GNAPs litigated and lost this issue in 2006, that loss is embodied in a final judgment that is no longer subject to review, and Gangi is bound by that judgment's *res judicata* effects.

Gangi similarly falls far short of showing any important or controversial question about the appropriate timing of remedies in cases about interconnection agreements. The First and Second Circuits are the only circuits to have considered whether there is a *nonwaivable* requirement that a litigant seek the interpretation or enforcement of an interconnection agreement from a state commission before going to federal court. Both agree that there is not. The Third Circuit has held that such a requirement exists, but has not determined whether it is waivable. With no split to resolve, Gangi's plea for review seeks nothing more than error correction from this Court. Moreover, the First Circuit did not err when it concluded that GNAPs' attempt to "sandbag" Verizon, Pet. App. 25a, ought to fail.

I. REVIEW OF THE FIRST CIRCUIT'S 2006 DECISION CONCERNING THE *ISP REMAND ORDER* IS UNWARRANTED AND PROCEDURALLY BARRED

A. Gangi Fails To Show Any Significant Conflict Concerning the *ISP Remand Order*

1. The cases that Gangi claims conflict with the First Circuit's 2006 decision in *GNAPs III* are easily distinguishable. His lead case is *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *see* Pet. 17-18. That case does not even mention payments due for dial-up ISP traffic or the *ISP Remand Order*. In *Ting*, the Ninth Circuit held that §§ 201(b) and 202(a) of the Communications Act of 1934 did not preempt certain state contract and consumer protection laws as applied to the predominantly interstate service provided by a long-distance carrier to its end users. *See* 319 F.3d at 1145-46.

Gangi also relies upon *New York SMSA L.P. v. Town of Clarkstown*, 612 F.3d 97 (2d Cir. 2010) (per curiam); *see* Pet. 18-19. Like *Ting*, that case does not mention payments due for dial-up ISP traffic or either *ISP Remand Order*. In *New York SMSA*, the Second Circuit held that a local ordinance that established a local "prefer[ence]" for certain types of wireless telecommunications facilities over others, and that attempted to supplement the FCC's regulation of radio frequency interference, was preempted by § 332(c)(7) of the Communications Act. *See* 612 F.3d at 105-06.

The holdings of *Ting* and *New York SMSA* have nothing to do with the question presented by the

petition.[14] Gangi claims that those cases (along with this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)) establish the general proposition that there is no presumption against preemption in "areas of traditional federal jurisdiction." Pet. 19. That broad claim of generalized tension in the reasoning of circuit-court decisions falls well short of the sharp conflict that calls for review by this Court.

Gangi's claim of tension also mischaracterizes the First Circuit's reasoning. He criticizes that court for relying on a passage from *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). *See* Pet. 17. The First Circuit's citation to *Hillsborough*, however, was specifically about construing the scope of a *regulatory* action. *See GNAPs III*, Pet. App. 101a ("'[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.'") (quoting *Hillsborough County*, 471 U.S. at 718). The First Circuit's reliance on that insight did not create a conflict with *Iowa Utilities Board*, *Ting*, or *New York*

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[14] *Qwest Corp. v. Arizona Corp. Commission*, 567 F.3d 1109 (9th Cir. 2009), which Gangi cites only in passing (at 18), held that a state commission exercising delegated federal authority under 47 U.S.C. § 271 could not rely on its state-law authority to impose certain pricing requirements that the FCC had expressly rejected. *Qwest*, like *Ting* and *New York SMSA*, does not mention payments due for dial-up ISP traffic or either *ISP Remand Order*. Indeed, *Qwest* undercuts Gangi's claim of a conflict: the Ninth Circuit noted in *Qwest* that it "agree[d] with" the First Circuit's decision in *Verizon New England Inc. v. Maine Public Utilities Commission*, 509 F.3d 1 (1st Cir. 2007). 567 F.3d at 1119.

SMSA, all of which dealt primarily or exclusively with questions of *statutory* construction.

2. Gangi then argues that the First Circuit "turn[ed] a blind eye to the FCC's manifest intent to establish an exclusive method of intercarrier compensation for internet-bound calls." Pet. 20. He relies upon the Eighth Circuit's decision in *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009), in support of his argument. Again, however, the Eighth Circuit's opinion does not mention payments due for dial-up ISP traffic or either *ISP Remand Order*. Instead, that court addressed the effect of a 2004 FCC order that addressed VoIP traffic, not dial-up ISP traffic. *See id.* at 905. This case does not involve any VoIP traffic. Gangi's unsupported assertion that two orders addressing different issues are materially identical is hardly enough to show the need for this Court's review.

Gangi further ignores the FCC's later indication that the First Circuit correctly construed the agency's intent as to dial-up ISP traffic, explaining to the D.C. Circuit that "the First Circuit had no difficulty recognizing [in *GNAPs III*] that the *ISP Remand Order* did not address the regulatory treatment of VNXX calls." Opposition of FCC to Petition for a Writ of Mandamus at 27 n.22, *In re Core Communications, Inc.*, No. 07-1446 (D.C. Cir. filed Dec. 27, 2007). The FCC's interpretation of its own regulatory regime is subject to a highly "deferential standard." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

3. Gangi next turns to a case that did involve the *ISP Remand Order* but had nothing to do with construing the scope of the FCC's pricing rules or whether they extend to long-distance dial-up ISP

traffic. *See* Pet. 24 (citing *Core v. FCC*, 592 F.3d 139). In *Core v. FCC*, the D.C. Circuit held that, in the *Second ISP Remand Order*, the FCC had adequately explained its statutory authority to promulgate the pricing rules that had been in effect since the *ISP Remand Order*. *See* 592 F.3d at 141. In doing so, the court approved the FCC's conclusion that ISP-bound traffic is within the FCC's statutory authority to regulate under § 201(b), because the dial-up *call* to the ISP (which may take place entirely in one state) is part of a longer interstate *communication* that begins with the dial-up user and ends somewhere on the Internet. *See id.* at 143-45.

As the First Circuit concluded, *Core v. FCC* said nothing to suggest that the long-distance calls at issue here were governed by the pricing rules imposed in the *ISP Remand Order*. *See* Pet. App. 17a. Gangi, moreover, fails to mention that the D.C. Circuit actually *cited GNAPs III* while clarifying that there was no dispute in *Core v. FCC* about the regulatory treatment of "a [local exchange carrier]'s provision of access for completion of a long-distance call." 592 F.3d at 144.

Further, the FCC's brief to the D.C. Circuit in *Core v. FCC* described the "traffic covered by the Commission's interim pricing rules" as that traffic "which occurs when two [local exchange carriers] collaborate to deliver calls to an ISP *within a local calling area*." Brief for FCC at 21, *Core v. FCC*, Nos. 08-1365, *et al.* (D.C. Cir. filed May 1, 2009) ("FCC's D.C. Cir. *Core v. FCC* Br.") (emphasis added). That, of course, is the very holding of *GNAPs III*. And the First Circuit in turn quoted and relied upon that passage from the FCC's brief in *GNAPs V*. *See* Pet. App. 17a. Thus, the First Circuit, the D.C. Circuit, and the FCC have all reviewed one another's reasoning,

and none has noted any tension. Gangi's attempt to manufacture a reviewable conflict from this situation deserves no credence.

4. Finally, Gangi claims (at 25) that *GNAPs III* conflicts with *Verizon Maryland Inc. v. Global NAPs, Inc.*, 377 F.3d 355 (4th Cir. 2004). That case involved a challenge to a state commission arbitration decision to which the *ISP Remand Order* did not apply because the arbitration predated the order's effective date. *See id.* at 367 ("The [*ISP Remand Order*] . . . expressly preserves the arbitration decisions here because they were issued before June 14, 2001."). The Fourth Circuit did not need to, and did not, adopt any holding concerning the preemptive effect of the *ISP Remand Order* on decisions issued after its effective date.

Gangi, however, relies on the Fourth Circuit's statement in dictum that the FCC "adopted a new compensation regime . . . to govern ISP-bound calls and announced that it was stripping state commissions of any authority to formulate the compensation regime for such calls." *Id.* That dictum, however, said nothing about the scope of the FCC's rules and did not opine (much less rule) on whether the *ISP Remand Order* pricing rules reached Virtual NXX ISP-bound traffic.

5. The only circuit case that Gangi cites that actually addresses the same question as the First Circuit did in *GNAPs III* is *Verizon California Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. 2006). In that case, the Ninth Circuit, following the First Circuit, held that the *ISP Remand Order* "has no effect on the determination of whether collection of call origination charges for ISP-bound VNXX traffic is appropriate." *Id.* at 1158. Gangi does not cite the Second Circuit's

decision in *Global NAPs, Inc. v. Verizon New England Inc.*, 454 F.3d 91 (2d Cir. 2006) — despite the fact that his company was a party to that case — but that court, also following the First Circuit, likewise rejected GNAPs' claims that the FCC's ISP pricing rules apply to Virtual NXX ISP traffic, *see id.* at 99-101 (citing *GNAPs III*). The fact that the only other on-point circuit decisions *agree* with the First Circuit is further evidence that review is unnecessary.

B. Limited Conflicts Among State Commissions Do Not Warrant Review

Gangi claims (at 26) that "the question presented here has generated widespread conflict and confusion among state commissions over the scope of their authority over internet calls." This claim would not justify granting a petition for certiorari even if correct. A conflict between state agencies over the interpretation of federal law does not warrant review, because such a conflict can be resolved by the district and circuit courts, or by the FCC.

In any event, the state commission decisions on which Gangi relies show no indication that the First Circuit's decision has created confusion. Instead, they show that *GNAPs III* helped to clarify the law. Every final decision that GNAPs cites as adopting GNAPs' position on the scope of the FCC's ISP pricing rules was issued in January 2005 or earlier. *See* Pet. 26-27 nn.48-50.[15] Accordingly, none of them had the benefit of *GNAPs III*. Gangi does not appear to dispute that, in the wake of *GNAPs III*, final

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[15] Other commissions during that time frame had joined the Department in concluding that the FCC's ISP pricing rules did not apply to long-distance calls to ISPs. *See* Brief of Appellee Verizon at 32-33 & nn.30-32, *GNAPs III*, No. 05-2657 (1st Cir. filed Dec. 14, 2005) (collecting decisions).

decisions at the state commission level have been consistent with the rule adopted by the First, Second, and Ninth Circuits — some without the need for judicial review, and others after review by district courts. *See* Pet. 27-28 nn.52-56.

Gangi also contends that this Court's review is warranted because of "untenable conflict between state commissions and the relevant court of appeals." Pet. 27 & n.56 (citing district court decisions in Arizona and Washington applying *Peevey*). On the contrary, as this Court has recognized, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. The ordinary operation of judicial review does not signal a need for intervention by this Court.

C. The Regulatory Scheme for Dial-Up Internet Access Lacks Prospective Importance

The pricing rules that the FCC established in the *ISP Remand Order* and maintained in the *Second ISP Remand Order* apply to dial-up ISP access, in which a user accesses the Internet over the traditional telephone network. Dial-up Internet access was extremely important more than a decade ago, when it was almost the exclusive means by which individuals and households obtained access to the Internet. Since that time, the explosive growth of broadband Internet access has substantially decreased the need for dial-up access, and that trend continues. As the FCC recently advised this Court, "fewer than 6 percent of Americans use dial-up Internet connectivity as their main form of home access," and the agency's current efforts "to promote broadband deployment . . . will likely further the already substantial decline in use of dial-up services." Brief for the

Federal Respondents in Opposition at 23-24, *Core v. FCC*, Nos. 10-185 & 10-189 (U.S. filed Oct. 12, 2010). Accordingly, even the *validity* of the *Second ISP Remand Order* "present[ed] a narrow question of diminishing practical significance." *Id.* at 23. That is also true of the even narrower question presented here about the scope of the FCC's pricing rules.

Gangi argues (at 30) that the question presented retains practical importance because two state agencies have drawn guidance from *GNAPs III* when considering VoIP traffic, which is not at issue here. The possibility that the decision of a court of appeals might indirectly influence other controversies in the future, however, is not a ground for review. Gangi, moreover, is ill-positioned to make such an argument: GNAPs previously told the First Circuit that "[t]he narrow question presented here is whether the FCC's Order applies to all ISP-bound traffic, including traffic that uses VNXX arrangements." Brief of Appellant GNAPs at 33, *GNAPs III*, No. 05-2657 (1st Cir. filed Nov. 28, 2005).

D. Review of the Scope of the FCC's ISP Pricing Regime Is Barred by *Res Judicata*

In any event, this case is a fatally flawed vehicle for considering the first question Gangi's petition raises. Were it to grant certiorari, this Court would "not have before [it] any issue as to the correctness of" the First Circuit's decision in *GNAPs III*, *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 441 (1986), because that decision is embodied in a final judgment no longer subject to appeal.

The district court's final judgment against GNAPs on the 2002 Complaint was entered on October 31, 2005, affirmed by the First Circuit on April 11, 2006, and is long past the point where it could be reviewed

by this Court. *See supra* pp. 6-8. Verizon filed the counterclaim that the First Circuit addressed in *GNAPs V* in response to GNAPs' 2005 Complaint, which resulted in a separate final judgment from the district court. *See supra* p. 12.[16]

Because the district court's October 31, 2005 judgment is long since final and unappealable, GNAPs' attempt to relitigate the questions presented in *GNAPs III* is barred by *res judicata*.[17] Accordingly, if this Court were now to grant review of Gangi's petition, it could not reach the underlying question of the applicability of the FCC's pricing rules. At most, the only question before this Court would be whether the First Circuit erred in determining that the "*Second [ISP] Remand Order* is not materially different from the *ISP Remand Order* on the issues of concern." Pet. App. 16a. That highly limited question does not warrant review.[18]

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[16] The proceedings arising from the 2002, 2003, and 2005 Complaints were consolidated before the same district judge. However, as the First Circuit explained with regard to the 2002 and 2003 Complaints, this consolidation was only "for purposes of convenience and efficiency" and did not prevent the district court from entering "[s]eparate judgments . . . in each of the . . . cases." *GNAPs I*, 396 F.3d at 22 (internal quotation marks omitted).

[17] Although this Court's review of a prior, interlocutory appellate panel ruling in the same case is not barred by the doctrine of law of the case, *see, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), this rule does not apply to the preclusive effect of a final judgment. *See Sheet Metal Workers*, 478 U.S. at 441 (declining to reconsider on certiorari in a related case the correctness of a lower court's earlier unappealed final judgment); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 432 (1976) (same).

[18] The First Circuit's opinion in *GNAPs V* does not state expressly whether it considered *GNAPs III* to bind GNAPs as a

E. The First Circuit's Decisions Were Correct

Finally, review is unjustified for the additional reason that the First Circuit's decisions were correct. In *GNAPs III*, the First Circuit correctly determined that the pricing regime established in the *ISP Remand Order* was meant to deal with "a particular issue of intercarrier compensation," Pet. App. 110a — the problem of "'reciprocal compensation obligations [as] appl[ied] to the delivery of calls from one [local exchange carrier]'s end-user customer to an ISP in the same local calling area that is served by a competing [local exchange carrier].'" *Id.* at 106a-107a (quoting *ISP Remand Order* ¶ 13). Because the order extensively discussed problems of regulatory arbitrage in that context, *see id.* at 107a-108a, but did not discuss other calling arrangements such as the toll-free, long-distance calls at issue here, the First Circuit correctly concluded that the FCC's pricing rules did not extend to the latter.

That conclusion was reinforced by the FCC's *amicus* brief, which confirmed that the order's "focus[]" was on the arbitrage problems created by paying reciprocal compensation on dial-up ISP traffic where

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matter of *res judicata*. *See* Pet. App. 15a-20a. Verizon clearly preserved in its briefing, however, the argument that GNAPs and Gangi were unable "to evade the bar of *res judicata*." Brief of Appellee Verizon at 51, *GNAPs V*, Nos. 09-1308 & 09-1309 (1st Cir. filed June 11, 2009). GNAPs and Gangi responded that *res judicata* did not apply because the *Second ISP Remand Order* "clarified the controlling law during the parties' continuous and on-going litigation concerning access charge liability." Reply Brief of Appellants GNAPs *et al.* at 8, *GNAPs V*, Nos. 09-1308 & 09-1309 (1st Cir. filed June 25, 2009). That argument is wrong, but, even if it had a colorable chance of succeeding, the substantial likelihood that this case would ultimately turn on a fact-bound procedural issue would nevertheless make it an unsuitable vehicle for answering the question presented.

the caller and the ISP are located within the same local calling area. *Id.* at 108a (internal quotation marks omitted). Furthermore, as noted above, the FCC subsequently endorsed *GNAPs III* in briefing before the D.C. Circuit, explaining to that court that its "pricing rules" encompass the traffic "which occurs when two [local exchange carriers] collaborate to deliver calls to an ISP *within a local calling area*." FCC's D.C. Cir. *Core v. FCC* Br. at 21 (emphasis added).

Finally, the First Circuit also rightly concluded in *GNAPs V* that the *Second ISP Remand Order* is "not materially different from the *ISP Remand Order* on the issues of concern." Pet. App. 16a. That order was intended to clarify the source of the FCC's authority to adopt its pricing rules, not to alter the substance of those rules. *See id.* at 17a (quoting the D.C. Circuit's explanation in *Core v. FCC*, 592 F.3d at 142, that the *Second ISP Remand Order* "'instituted substantially the same rate cap system'" as the original order). This Court should leave undisturbed the First Circuit's correct resolution of that narrow question.

II. REVIEW OF THE QUESTION WHETHER GNAPS WAIVED ANY EXHAUSTION DEFENSE IS ALSO UNWARRANTED

A. Gangi Fails To Establish Any Conflict Relevant to the First Circuit's Waiver Holding

Gangi also fails to show the existence of any split among the circuits concerning the question whether federal law imposes a nonwaivable administrative-exhaustion requirement before a party to an interconnection agreement under the 1996 Act may seek to enforce that agreement in federal court. The First

Circuit held only that GNAPs had waived any exhaustion defense it might have had, and therefore did not need to decide whether such an exhaustion defense in fact exists. *See* Pet. App. 24a-25a. Gangi identifies no circuit case holding the contrary.

1. Gangi first relies (at 31-32) on *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003) (en banc). *BellSouth*, however, did not even decide whether an exhaustion defense exists in cases involving interconnection agreements, much less whether such a defense (if one exists) is waivable. *BellSouth* instead dealt with the question whether Congress's "grant of authority" to state public utility commissions in 47 U.S.C. § 252(e) over the creation of interconnection agreements "encompass[ed] the interpretation of [those] agreements, not just their approval or rejection," and held that it did. 317 F.3d at 1277.

In *BellSouth*, the dispute over the enforcement of the interconnection agreement had been presented initially to the Georgia Public Service Commission, *see id.*, and the question for the court was whether the agency exceeded its jurisdiction by hearing the dispute. The Eleventh Circuit was not faced with any contention that a dispute filed initially to the district court *had to* be presented to the agency. Still less was it faced with a case where (as here) such a defense was raised belatedly after years of litigation in district court.[19]

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[19] Gangi also cites (at 34) *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir. 2000) ("*SW Bell v. PUC*"), and *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493 (10th Cir. 2000). Both of those cases, like *BellSouth*, involved the question whether state commissions had authority

2. Gangi also relies (at 32-33) on *Core Communications, Inc. v. Verizon Pennsylvania Inc.*, 493 F.3d 333 (3d Cir. 2007) ("*Core v. Verizon*"). The Third Circuit (unlike any other) did adopt a rule that "interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission." *Id.* at 344. The Third Circuit, however, had no cause to address whether that rule gave rise to a defense that was waivable or nonwaivable. The defense before it had been timely asserted. *See id.* at 336-37 (describing the case's procedural history).[20]

Indeed, the Third Circuit would likely agree that the defense it adopted was waivable. That court observed candidly that the 1996 Act gives "no real indication of what role the state commissions are to play, and . . . is simply silent as to the procedure for post-formation disputes" about interconnection agreements. *Core v. Verizon*, 493 F.3d at 340 (discussing

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to hear complaints seeking to enforce interconnection agreements, not the question whether that authority gave rise to a nonwaivable exhaustion defense in a federal court action. *See Brooks Fiber*, 235 F.3d at 497; *SW Bell v. PUC*, 208 F.3d at 480.

[20] Before the district court in *Core v. Verizon*, the Verizon affiliate that was a party to that case argued that the district court lacked subject-matter jurisdiction. That incorrect argument was rejected: the district court found that it had subject-matter jurisdiction, but dismissed on nonjurisdictional grounds. *See Core Communications, Inc. v. Verizon Pennsylvania Inc.*, 423 F. Supp. 2d 493, 497-98 (E.D. Pa. 2006), *aff'd in part, vacated in part, and remanded*, 493 F.3d 333 (3d Cir. 2007). On appeal, Verizon Pennsylvania revised its position and argued that the state commission had primary jurisdiction over Core's complaint because it involved technical issues. Verizon Pennsylvania neither advanced nor endorsed the exhaustion-type rule that the Third Circuit adopted.

47 U.S.C. § 252). Accordingly, the court relied on its own admittedly "broad[] reading" of the FCC's interpretation of the 1996 Act in its *Starpower* order.[21] *Id.* at 342. The Third Circuit, however, would agree with the First Circuit that a judge-made exhaustion requirement derived from a silent statute "is a non-jurisdictional affirmative defense" that must be preserved by timely assertion. *Metropolitan Life Ins. Co. v. Price*, 501 F.3d 271, 280 (3d Cir. 2007).

3. Gangi also relies (at 33-34) on *Illinois Bell Telephone Co. v. Global NAPs Illinois, Inc.*, 551 F.3d 587 (7th Cir. 2008) (Posner, J.). The questions necessary to the Seventh Circuit's judgment in that case were whether the district court had diversity jurisdiction over a dispute between a GNAPs affiliate and a subsidiary of AT&T, and personal jurisdiction over another GNAPs affiliate. The court held that it did, and therefore reversed the district court's contrary conclusion. *See id.* at 590, 597-98.

Illinois Bell also addressed in broad dicta the circumstances under which "issues that arise in the course of a federal suit to enforce an interconnection agreement may sometimes be within the 'primary jurisdiction' of the state regulatory agency." *Id.* at 594. Those dicta are not relevant here because GNAPs "expressly disavowed any desire . . . to invoke the discretionary doctrine of primary jurisdiction" in this case. Pet. App. 24a n.16.[22]

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[21] Memorandum Opinion and Order, *Starpower Communications, LLC*, 15 FCC Rcd 11277 (2000) ("*Starpower*").

[22] Gangi contends (at 33) that the Seventh Circuit was referring to "the doctrine of exclusive primary jurisdiction." As the First Circuit noted, this contention "ignores [the Seventh Circuit's] plain statement that the court was invoking discretionary and not exclusive primary jurisdiction." Pet. App. 25a; *see*

4. As Gangi concedes (at 35), the Second Circuit has reached a result on similar facts consistent with the First Circuit's decision in *GNAPs V*. *See Southern New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 135 (2d Cir. 2010) (rejecting GNAPs' argument that a federal court is "divest[ed] . . . of its jurisdiction over [a] claim" to enforce a federal tariff "when the provisions of an [interconnection agreement] are asserted in defense"). The only two circuits to have weighed in on the question actually presented are thus in accord. Gangi cites (at 37-39) various nonprecedential district court decisions that he claims support him. Disagreement that is limited to the district court level does not warrant review by this Court.

B. The First Circuit's Decision Was Correct

Review is also unwarranted because the First Circuit correctly rejected any exhaustion defense that GNAPs might have had. The court of appeals first concluded that the district court had subject-matter jurisdiction over this case under 28 U.S.C. §§ 1331 and 1367 because Verizon's counterclaim against GNAPs and Gangi was sufficiently related to the undisputedly federal claims that GNAPs raised in its 2005 Complaint and because Gangi could point to nothing that took that jurisdiction away. *See* Pet. App. 23a. Although he vigorously contested jurisdiction in the court of appeals, Gangi does not appear to do so now. *See* Pet. 37.

Illinois Bell, 551 F.3d at 595-96 (distinguishing a case referring to "'exclusive original jurisdiction'"); *id.* at 596 ("[W]e do not think the court need refer all disputes over an interconnection agreement to the state commission, only those where the dispute raises a genuine policy issue . . . .").

The First Circuit then held that, because any exhaustion requirement here did not limit the district court's subject-matter jurisdiction, it could be (and was) waived by GNAPs' failure to raise it in a timely fashion. *See* Pet. App. 24a-25a. That conclusion is strongly supported by *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), on which the First Circuit relied, and by other decisions of this Court.[23] And the facts of this case — in which GNAPs itself asserted a claim for charges to recover under an interconnection agreement, litigated for years in district court, and then belatedly tried to switch forums after unfavorable rulings made it seem likely that Verizon would prevail — confirm the wisdom of the rule. *See supra* pp. 9-10 & note 10.

The First Circuit's judgment could also be affirmed on the alternative basis that the Third Circuit erred in recognizing an exhaustion requirement to begin with. The Third Circuit, which is the only court of appeals to hold that such a requirement exists, based the requirement entirely on its reading of the FCC's order in *Starpower*. *See Core v. Verizon*, 493 F.3d at 341-44. But the FCC in *Starpower* did not rule that interconnection-agreement disputes must *always* go

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[23] *See Arbaugh*, 546 U.S. at 516 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (explaining that a "claim-processing rule" that does not limit subject-matter jurisdiction, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[F]iling a timely charge of discrimination with the [Equal Employment Opportunity Commission] is not a jurisdictional prerequisite to suit in federal court, but a requirement that . . . is subject to waiver, estoppel, and equitable tolling.").

to state agencies first. Instead, it explained that state commissions have the responsibility to resolve such disputes in "some circumstances," but not in others, depending on the facts of the case and the terms of the dispute-resolution provision in the applicable interconnection agreement. *Starpower* ¶ 6 & n.14.

This case is not a suitable vehicle to consider the Third Circuit's conversion of *Starpower*'s fact-sensitive approach into an exhaustion rule, because the Court's holding would very likely instead rest on the waiver ground that the First Circuit adopted — as to which Gangi has shown no conflict. Nevertheless, this additional ground for affirmance further confirms that the First Circuit's judgment is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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